

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Albany Medical Center and John Michael Vitale and
AMC Registered Professional Nurses
NYSUT/AFT/AFL-CIO. Cases 3-CA-24094 and
3-CA-24162**

May 28, 2004

DECISION AND ORDER

**BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH**

On December 10, 2003, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Albany Medical Center, Albany, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for Conclusions of Law 3.

"3. By telling its nursing employees that they would have to renegotiate for a \$2 raise that was promised to them before the Union's petition was filed, the Respondent unlawfully coerced employees with regard to their membership in, sympathy for, and support of the Union prior to the election in violation of Section 8(a)(1) of the Act."

2. Substitute the following for paragraph 1(a).

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Further, we do not rely on the judge's statement that he "[did] not think the case would turn out differently whether [he] credited LaPosta's version or that of Sigond" in affirming the judge's credibility findings.

² We have modified the judge's Conclusions of Law 3, recommended Order, and notice to more accurately reflect the particular statement that the judge found to be unlawful.

"(a) Telling its nursing employees that they would have to renegotiate for a \$2 raise that was promised to them before the Union's petition was filed."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 28, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten that an announced \$2-an-hour pay increase will have to be renegotiated or changed in any way if you select the Union as your collective-bargaining representative.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ALBANY MEDICAL CENTER

Alfred N. Norek, Esq., for the General Counsel.

Todd Shinaman, Esq., of Rochester, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Albany, New York, on September 16, 2003. The original charge in Case 3-CA-24094 was filed by John

Michael Vitale, an individual, on February 13, 2003. The first amended charge was filed by Vitale on April 29, 2003, and a second amended charge was filed by him on May 30, 2003. The original charge in Case 3-CA-24162 was filed by AMC Registered Professional Nurses, NYSUT/AFT/AFL-CIO (the Union) on March 25, 2003. The first amended charge was filed by the Union on April 30, 2003, and a second amended charge was filed by the Union on May 14, 2003.¹ On June 30, 2003, Region 3 issued an Order consolidating cases, consolidated complaint and notice of hearing alleging the Albany Medical Center (the Respondent or Medical Center) has engaged in certain activity in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (Act). The Respondent filed a timely answer wherein, inter alia, it admits the jurisdictional allegations and the supervisory and agency allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, engages in the operation of an acute care hospital and in medical education and research programs at its facility in Albany, New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and the Issues for Determination

Albany Medical Center is an acute care hospital and teaching center in Albany, New York. There have been two recent campaigns by unions to organize certain of its employees. The first took place in 2002, and the second in the early part of this year. The complaint alleges certain conduct by Respondent's administrators during the 2003 campaign violated Section 8(a)(1) of the Act. The allegations of unlawful conduct fall into three separate and discrete categories. First, Respondent is alleged to have threatened and taken adverse action against its phlebotomist John Michael Vitale for soliciting support for the Union. Second, Respondent is alleged to have threatened employees with the loss of existing benefits if they selected the Union in the election. Third, Respondent is alleged to have threatened an employee with unspecified reprisal because of her support for the Union.

Respondent admits that the following persons are supervisors within the meaning of Section 2(11) of the Act and are agents within the meaning of Section 2(13) of the Act, and have the job title noted:

Mary Jo LaPosta	Senior Vice-President— Chief Nursing Officer
-----------------	---

Karen Sigond ²	Medical Intensive Care Manager
Vanessa Helms	Assistant Phlebotomy Supervisor
Christine Dolan	Phlebotomy Supervisor

The complaint specifically alleges that Respondent engaged in unlawful conduct as follows:

1. On or about January 17, by Mary Jo LaPosta, threatened employees that it would not implement, or would take away, a promised two-dollar per hour wage increase if they selected the Union as their collective-bargaining representative.

2. On or about January 17, by Mary Jo LaPosta, threatened employees with cancellation of the weekend track program if they selected the Union as their collective-bargaining representative.

3. On or about January 17, by Mary Jo LaPosta, threatened employees with the loss of vacation time if they selected the Union as their collective-bargaining representative.

4. On a date between January 23 and February 6, by Karen Sigond, threatened employees with unspecified reprisals because of their support of the Union.

5. On February 8 and 9, by Vanessa Helms, threatened employees with unspecified reprisals because of their support of the Union.

6. On February 9, by Vanessa Helms, threatened to transfer an employee to another department because of the employee's support of the Union.

7. On various dates between February 5 and March 6, reassigned Vitale from the Inpatient Phlebotomy Department to the Outpatient Phlebotomy Department.

As noted above, there were two petitions filed to represent Respondent's employees. The case numbers and the dates of various actions taken with respect to the petitions are as follows:

Case 3-RC-11168

October 12, 2001—Petition filed by New York Health & Human Service Union, 1199 SEIU, AFL-CIO (Service and Maintenance Unit)

September 2, 2002—Decision and Direction of Election

September 2, 2002—Order Approving Request to Withdraw Petition, Canceling Election and Withdrawing Notice of Election (scheduled for October 16 and 17, 2002)

Case 3-RC-11300

January 10, 2003—Petition filed by Albany Medical Center Registered Professional Nurses, NYSUT/AFT/AFL-CIO

January 23, 2003—Stipulated Election Agreement

February 26 and 27, 2003—Dates of Election

March 7, 2003—Certification of Results

¹ All dates are in 2003 unless otherwise indicated.

² This person's name is spelled in a variety of ways in the record. I have adopted this spelling as it is the one used in the complaint and in the Employer's brief.

B. Facts and Discussion of the Issues Raised by John Vitale

Vitale has been employed by Respondent as a phlebotomist since 1994. In this role, he draws blood from patients, either on the hospital's various floors or in an outpatient office. Both the inpatient and outpatient phlebotomy services are performed by the Medical Center's phlebotomy department. As pertinent, the department is led by Lois Archer, phlebotomy administrator, Christine Dolan, phlebotomy supervisor, and Vanessa Helm, assistant phlebotomy supervisor. Dolan testified that there are two outpatient labs located on the first floor of the hospital. An inpatient office is maintained on the hospital's fifth floor. The phlebotomy department has about 35 employees. Prior to this year, Respondent had hired phlebotomists either to work primarily in inpatient service or primarily in outpatient service. It only used phlebotomists for one department to work in the other in an emergency situation. It is now trying to integrate the two departments to make the entire operation more efficient and productive. It implemented a new staffing plan that calls for moving phlebotomists between the two departments and for changing hours to meet demands of customers.

Dolan testified that about mid-December 2002, a number of clinics in the hospital announced they were going to cease drawing blood and would be sending their patients to Respondent's outpatient lab. As this phased in, there was an increase of about 27 percent in the outpatient volume. Initially, this increase was handled in a reactive way that caused a number of complaints from customers. She then held a meeting with her inpatient staff and announced that they would be working in outpatient service more often to meet the increased demand in that department. This meeting took place about February 6.

Vitale works from 6 a.m. to 2:30 p.m., Monday through Friday with one day off in between after every fourth day and every other weekend. Prior to February 6, Vitale was assigned to inpatient phlebotomy and had been so assigned since he was employed by Respondent. In early February, on Vitale's shift the maximum and preferable staffing was six phlebotomists, though on some days only four were available. His fellow phlebotomists were Nancy Keary, Mark Brooks, Ana Luis, Kareen Smith, and Joyce Thomas. There were two other shifts for phlebotomists, the second and third. The hours of the second shift were 2:30 to 11 p.m., and the hours of the third shift were 11 p.m. to 7 a.m. The staffing level of the second shift was two or three phlebotomists. On Vitale's shift, the Respondent employed four phlebotomists in its outpatient office on the first floor of the hospital. Respondent also employed phlebotomists at four offsite locations in the Albany area.

Work assignments for inpatient phlebotomists are given to the employees by computer, which assigns them to certain units. On the first shift, Vitale was expected to be out on the units drawing blood by 6:20 a.m. and to be finished with the morning rounds by 8:30 or 9 a.m.³ He would then take a break and then go back out for a second round of drawings. He usually completed this round by 11 a.m. He would then perform a

third round and then take lunch. He would then complete another round and would be done for the day. On a typical day he would draw blood from 25 to 30 patients. On his lunch and other breaks, he was not restricted as to where he could take it, except the limitations of time.

Vitale was involved in both union attempts to represent the Respondent's employees. In the first case, 3-RC-11168, he was head organizing committee member for SEIU 1199, charged with organizing, getting employees to union meetings, and communicating information from the Union to employees. He was present at part of the R-case hearing in this first organizing effort. During this organizing effort, he was not assigned to work in the outpatient phlebotomy office but once. However, he was counseled by Supervisor Dolan in April 2001 for soliciting support for the Union while he was working and the employee being solicited was also working.

Respondent's employee manual states in pertinent part, "Solicitation by an employee for any cause or organization is prohibited during the employee's working time, or during the working time of the employee(s) being solicited, and it is prohibited at any time (working or nonworking time) in direct patient care areas of the Center. The distribution of literature on Center property is prohibited during their working time or at any time in direct working areas of the Center."

Vitale was familiar with the Respondent's solicitation policy, but testified that he did not think it prohibited him from talking about the Union during his working time or the working time of the person he was speaking with, so long as they were not in a patient care area. Vitale denied soliciting for the Union in patient care areas. I do not credit this testimony. He testified that employees regularly talked to one another when working. They talked about topics of general interest, and sometimes about unions. He testified that other of Respondent's employees constantly came looking for him, or would stop him on rounds to ask questions about the Union or vent their complaints about Respondent's management. Testimony from other witnesses established that Vitale often initiated these conversations.

When Vitale learned of the second organizing attempt in 2002 by the AMC Registered Nurses, NYSUT/AFT/AFL-CIO, he went to the Union's office and met with Megan O'Brien, the lead organizer for this campaign. He asked how he could help and he thereafter supported the organizing effort by wearing union buttons and actively soliciting support for the Union among Respondent's employees. Vitale would not have been in the bargaining unit had the second organizing effort been successful.

On February 6, Vitale attended a meeting in the phlebotomy office conducted by Dolan and Helms. Also in attendance were five or six other phlebotomists. The supervisors discussed the possibility of increased blood draws in the outpatient office because some of the doctors' offices in the hospital were ceasing doing their own blood draws.⁴ Because of the increased demand, inpatient phlebotomists were put on notice that they may have to assist the outpatient office. Vitale worked on a quality improvement team in phlebotomy and while on that

³ The vast majority of blood draws are taken in the first morning round of blood draws. Following this draw, inpatient phlebotomists are expected to make regular rounds in their assigned units, respond to pages for emergency blood draws, and assist coworkers as needed.

⁴ Vitale testified that in fact there has been an increase in the number of outpatient blood draws in 2003 as compared with 2002.

committee had suggested that he might be a good person to send to the outpatient office to improve its performance. He made this suggestion about February 18 or 19.

Thereafter, in the period February 6 to March 27, Vitale was assigned to work in the outpatient office for 17 of the 40 days he worked during this period. On the two union election dates, February 26 and 27, he worked in the outpatient office. On two occasions in this period, fellow phlebotomist Smith was reassigned to the outpatient office, and on three occasions fellow phlebotomist Keary was similarly reassigned. On one occasion, a phlebotomist named Sarah Guy was reassigned from inpatient to outpatient. The outpatient office is not open on weekends. If there is a need for a phlebotomist to draw blood from a person not a patient in the hospital on a weekend, an inpatient phlebotomist will perform the blood draw.

Dolan testified that assignment of inpatient phlebotomists to various departments to provide inpatient service is rotated among the inpatient staff so that each phlebotomist works an equal amount of time in each department over a period of time. This staffing plan had not been utilized prior to March to assign inpatient phlebotomists to the outpatient department. Dolan testified that after March, staffing was reduced in inpatient service after 10 a.m. to four phlebotomists and that the other inpatient phlebotomists are sent to outpatient service on a regular rotation.

According to Vitale, subsequent to March 27, he was not again assigned to outpatient service until he was assigned to that service "a little bit" in August. Dolan credibly contradicted this testimony by Vitale. She testified and I accept that he worked in the outpatient service on 10 or 12 days in the period April through June. Other inpatient phlebotomists also worked in the outpatient service during the same time period.

Prior to February 6, Vitale had occasionally been assigned to the outpatient office. He testified that in that period of time, he could refuse the assignment and management would assign another phlebotomist. The last time Vitale could remember being assigned to the outpatient office, prior to February 6, was 1 or 2 years ago. He went to help the outpatient phlebotomists get caught up. This was the only occasion he could remember, pre-February 6, that he actually worked in the outpatient office.

Post-February 6, on the days when he was reassigned to the outpatient office, he would complete his first round of inpatient blood draws, and then report to the outpatient office about 9 or 9:30 a.m. Vitale testified that work in the inpatient service is very different from work in outpatient service. In outpatient service, he dealt with persons with organ transplants who get blood drawn on a regular basis, took urine, stool and throat samples, and dealt with about 50 children a day. In inpatient service, he did not do these things, unless he was assigned to the children's ward. In inpatient service, he worked on each of the hospital's floors as opposed to being in one room in the outpatient office. In inpatient service, he had regular contact with Respondent's other employees, but would have no contact with them in outpatient service.

Vitale testified that on February 8, he had a conversation with Supervisor Helms. She told him that during that day, Supervisor Dolan wanted to talk to him with regard to e-mails she had received accusing Vitale of unionizing on the floors during

his workday. Later that day, he met with Dolan and Helms in Dolan's office. Dolan said that she had received a couple of e-mails accusing Vitale of unionizing on the hospital's floors and bashing the Respondent's CEO, James Barber. Vitale agreed that he had been doing that. Dolan then specifically accused him of bashing Barber on floor E4. Vitale agreed that he had done that and told Dolan that Barber had cut employees' retirement by 2-1/2 percent and raised their insurance payment. He asked if he should be applauding Barber for doing these things. Dolan then stated she had received a complaint from Nurse Manager Christine Ashbey on floor C5. Ashbey had complained that Vitale was talking to her nurses at a time when they were working or trying to work. Vitale admitted that he had in fact talked to one of her nurses, Christine Varney. Varney had asked him if the Respondent could take away a promised \$2 raise as it had threatened to do. Vitale told Varney that Respondent could only take it away in contract negotiations. Vitale testified that this conversation took 2 or 3 minutes.

In the meeting with Dolan and Helms, Helms then asked him why people were so intimidated by him? According to Vitale, Dolan then said that it was not Vitale who intimidated people, rather it was what he stood for, a union. Dolan did not recall Helms asking this question or that she replied as testified to by Vitale. I do not know if this particular exchange really happened. Vitale appeared prone to exaggerate or embellish conversations, but there is testimony that one of the nurses who Vitale solicited felt "trapped" by him.

Vitale testified that Helms then said that he needed to work in the outpatient office for a while. Vitale and the two supervisors had some heated words and he left their office. He worked that day, the 8th in inpatient service and worked in inpatient service on February 9 as well. On February 10, he worked in the outpatient office. He had worked in outpatient service on February 5 and 6, dates preceding this meeting with Dolan and Helms.

Dolan testified that she selected Vitale to work more often in the outpatient office for several reasons. He is a level three phlebotomist and thus competent to handle any problem that would be encountered in the outpatient service. She also considered him to be a very skilled and knowledgeable phlebotomist. The outpatient service serves a large number of children and Vitale is very competent at drawing blood from people in this age group. She had also received complaints that he had been disruptive of the workflow in the nursing units, and his productivity was low compared to other staff. She believed this lack of productivity was because he was talking with other staff rather than working. Dolan felt that his skills and time would be better used in the outpatient service. She also testified that because of Vitale's skills, he would have been a prime candidate for outpatient service, even in the absence of complaints about his talking to others and his solicitation.

Dolan testified that in the latter part of 2002, she was receiving complaints that Vitale was out on the floors creating disturbances and interfering with the flow of work. He was accused of talking to employees while they were working and some of the talk involved solicitation for the Union. She also received complaints that he was not providing support to coworkers, was

speaking negatively about the Medical Center's CEO, and that Vitale was not answering pages. Dolan testified that she has never allowed employees to solicit on working time.

Christina Ashbey is nurse manager of the orthopedic and plastic surgery unit at the Medical Center. She complained to Dolan that Vitale was spending a lot of time on her unit soliciting for the Union. The staff he solicited complained to her that he was obstructing their work. They also complained that Vitale would sit at their workstations where they are supposed to sit, and that he would use their telephones for personal calls. She noted that one of her nurses complained that Vitale approached her while she was preparing medications for a patient in pain and began speaking about the Union. This nurse felt "trapped."

Ashbey herself observed Vitale sitting at nurses' workstations interfering with the work of her nurses. She observed him in patient care areas soliciting nurses for the Union. She testified that on those occasions she observed him, he had initiated the contact. She testified that Vitale engaged in this contact from fall of 2002 until the end of February 2003. Since February, Vitale has come to the unit, performed his work and left without bothering anyone. She testified that he is not as talkative as he had been before.

When Vitale came to work on February 10, a night-shift phlebotomist, James Wood, told Vitale that he had better watch his back, that there was a lot of pressure in the office, and that Mary Jo LaPosta had made a comment that she wanted Vitale's head on a silver platter. Wood further told him that the Respondent's administration was putting immense pressure on Dolan to get Vitale off the floors until the union election was over or to get rid of him entirely. Acting on this information, at about 9 a.m., Vitale went to Helms and confronted her. According to Vitale, he asked Helms if Mary Jo LaPosta had said that she wanted his head on a silver platter. Again, according to Vitale, Helms nodded her head in an affirmative way. According to Vitale, Helms said that Phlebotomy Administrator Lois Archer had asked Helms if there were any place to put Vitale until this (the union campaign) was over. Helms said that she considered this an unusual question. Vitale testified that he answered Helms abruptly and she said, "John, it's only a job. I don't feel comfortable doing this either." Dolan and Helms deny all of Vitale's testimony about the "head on a silver platter" and LaPosta denies ever making such a statement. Dolan also denied being asked by Archer to put Vitale somewhere until the election was over. I credit these denials and reject this testimony by Vitale. If Archer or Dolan wanted to get Vitale out of the Medical Center, they could have transferred him to one of the Center's satellite offices. In February, Dolan asked to be transferred to one such satellite office, but the request was denied.

On Friday, February 14, having worked in outpatient service on February 10, 12-14, Vitale went to Helms and stated that he had completed his week in the outpatient office and was not going to work there anymore. He asked her to send someone else to work there. According to Vitale, Helms told him not to put her in an awkward position. Later that day, Vitale was called into Dolan's office with Helms. Dolan told him that Helms had informed her of Vitale's statement earlier in the day.

Dolan then threatened him with a suspension for insubordination if he did not report to the outpatient office when assigned to work there. He asked for time to consult with an attorney before answering. The next day, Vitale consulted with a David Slutsky from SEIU 1199. After this consultation, Vitale asked to be transferred to one of Respondent's offsite offices near his home. He was not so transferred and Vitale agreed to work in outpatient service when assigned.⁵ As noted earlier, Vitale suggested to Dolan and Helms the following week that he would be a good person to send to the outpatient office.

Helms remembers Vitale stating that he was going to refuse to go to outpatient service. She inquired of human resources how to handle this refusal. Human resources gave her advice and she met with Vitale and asked if he felt that he was being asked to do something he was not competent to do, or did he feel his health was being put at risk. Vitale answered in the negative. She told him that he would be required to work in the outpatient department when asked to do so. She remembers Vitale saying he wanted to seek counsel and left. The following day, Vitale reported to her that his attorney had advised him to follow instructions.

Vitale testified that on February 15 he had a conversation with Dolan. Vitale was sitting at a table in the breakroom with employee Steve Scarano, when Dolan came up and said, "Steve, John's mad at me, Steve." According to Vitale, she then put her hand on his shoulder and said, "If its any consolation to you, Lois Archer and Dr. Rosano don't feel good about this either." Dolan denies making this statement and I credit her denial.

I believe that the phlebotomy department began to supplement the outpatient phlebotomy service with inpatient phlebotomists because of a substantial increase in demand in the outpatient service and the decision to do so had nothing to do with the union campaign. I believe that Vitale was initially selected to get the bulk of these assignments to the outpatient service in part because of his solicitation efforts. However, I do not find that Vitale's solicitation on the working floors and in patient areas on both his working time and that of fellow employees was protected activity. This activity is in direct violation of the Medical Center's lawful no-solicitation policies of which Vitale was aware. That he testified that he could solicit anywhere at any time so long as it was not in a patient area does not give his conduct the protection of the Act. Clearly, Respondent's policy prohibits such conduct. It is also clear that Vitale's actions did disrupt the work of the Medical Center and that it had a legitimate reason for wanting him to stop his solicitations in work and patient areas during times when he was supposed to be working and the person solicited was working. It also had a legitimate interest in improving his productivity by utilizing the time he was soliciting other employees while he and they were supposed to be working.

⁵ During the December 2002 through March 2003 timeframe, some of Respondent's hospital phlebotomists were temporarily assigned to its Schenectady, New York offsite office to fill in for phlebotomists regularly assigned there who were on maternity leave. Vitale was not so assigned.

There is nothing in the record to suggest that working in the outpatient department in any way inhibited Vitale's ability to solicit on his breaks and at lunch. He could take breaks and eat lunch anywhere he did when he worked in the inpatient department. There is nothing in this record to suggest that the Medical Center objected to his solicitation efforts when he was on a break or other nonworking time and the employee being solicited was likewise on nonworking time and the solicitation was not in a patient area.⁶

There is nothing in the record to suggest that Respondent was trying to remove Vitale from the Medical Center to inhibit his ability to engage in protected solicitation for the Union. If it had wanted to do this, it could have transferred him to one of its offsite facilities as Vitale himself requested. I believe that its refusal to transfer him belies any claim that Respondent was trying to restrict Vitale's legitimate union activities.⁷

I cannot find any credible evidence that Vanessa Helms threatened Vitale or any other employee with unspecified reprisals because of their support of the Union nor can I find any credible evidence that Helms threatened to transfer Vitale or any other employee to another department because of the employee's support of the Union. Helms and Dolan did object to Vitale about his unprotected solicitation as discussed above. And they did reassign Vitale to the outpatient department in part because of his unprotected activities. This is not unlawful behavior by them and I will recommend the complaint be dismissed insofar as it relates to these allegations.

C. Did Respondent Unlawfully Threaten Employees with Loss of Existing Benefits?

Deborah Busch is a registered nurse who works for Respondent on its medical intensive care unit. She has been employed by the Medical Center since 1997, with a year of interruption from about June 2001 to June 2002. Her supervisors are Nurse Manager Karen Sigond and Assistant Nurse Manager Lisa St. James. She was eligible to vote in the election and she was one of the lead employee organizers in the 2003 union campaign.

On January 17, she attended a meeting on her unit with about eight employees. She described the meeting as an open forum regarding union activity. Busch testified that Respondent's Senior Vice President and Chief Nursing Officer Mary Jo LaPosta told the employees at this meeting that, "if the Union were to get in at Albany Medical Center everything would be

wiped clean, we would have to start from scratch." According to Busch, LaPosta also told them that the employees would have to renegotiate for a \$2 raise that was promised to employees before the Union's petition was filed. On cross-examination, Busch added that LaPosta also said that "she has no control once the union comes in whether we get our raise or not. And that she could not support us getting the raise if the union did get elected in. That we would lose that as a benefit. She could not advocate for us to receive that \$2 raise at the bargaining table. She said that it was something we had to negotiate for . . . what she said was that we would lose our \$2 raise if the Union came in because the hospital would not be able to give it because we would be bargaining at the table. They were not going to honor that commitment prior to filing for an election." According to Busch, LaPosta also stated that the employees would have to renegotiate their vacation time and their weekend track program.⁸ Busch also said the Union had no power over the registered nurses and that she was the voice of these nurses and would represent them.

According to Busch, she challenged LaPosta by saying the raise could not be taken away and that bargaining would not start at ground zero. She noted that her father was the retired president of the local carpenter's union and had derived many benefits from the union including a generous pension and medical coverage.

At this meeting, Sigond handed Busch a booklet published by the NLRB called "A guide to basic law and procedures under the National Labor Relations Act." The booklet was left at the nurse's station for the nurses to review if they wished. Busch believed that this booklet was given to the nurses by management to add weight to what LaPosta told them. However, Busch reviewed the booklet and agreed with Respondent's counsel that it does not support what Busch alleges that LaPosta said in the meeting.

Mary Jo LaPosta is responsible for strategic planning around patient care for the Medical Center and for day-to-day operations of the Center as it relates to patient care. In the context of the union campaign, her role was to speak about the union election, the processes of the election and how the Center would behave during the election process. She had the same role in the 2001 union organizing campaign. She had studied the National Labor Relations Act and had been trained by Respondent's labor counsel with respect to restrictions on communications during the campaign. She was aware that she could not make any promises or threats during the campaign. She and other members of management, with counsel, had anticipated questions that might be asked of them and formulated answers that would be appropriate within the guidelines of the Act.

Questions about the promised \$2-an-hour raise were among those anticipated. LaPosta testified that there is a profound

⁶ The Supreme Court and the Board have established special rules restricting otherwise protected activity in the context of health care facilities. *NLRB v. Baptist Hospital*, 442 U.S. 773, 784 (1979) (an employer can prohibit union activity in the corridors and sitting rooms of a large hospital because such activity "in the presence or within the hearing of patients may have adverse effects on their recovery."); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *St. John's Hospital*, 222 NLRB 1150 (1976). These rules recognize a health care employer's compelling interest in providing undisrupted patient care in a tranquil setting. Accordingly, it is well settled that health care employers are permitted to ban otherwise protected activity in "immediate patient care areas."

⁷ I also find it not just a little unusual that Vitale now objects so vigorously to his assignment in February to the outpatient service, when in the same month he suggested to management that he would be a good candidate to be assigned to the outpatient department.

⁸ The weekend track program is one that is designed to encourage nurses to work on weekends when the Respondent is typically short staffed. In general, it offers about 40 hours pay for 24 hours actually worked on weekends. At the time of this meeting, nurses received 6 weeks' paid vacation as part of their benefits package. According to Busch, the nurses were told by LaPosta that this benefit would be "wiped clean" along with other benefits and would have to be renegotiated.

national nursing shortage and that the Albany, New York area is at the epicenter of that shortage. Recruitment and retention of nurses is one of her highest priorities. Giving nurses a \$2-an-hour wage increase was one important component of Respondent's recruitment and retention strategy. Respondent at some point in late 2002, had given each nurse a sheet setting out that employee's current rate of pay and showing what the rate would be when Respondent implemented a \$2-an-hour raise on May 18, 2003. LaPosta testified that she believed it very important to move forward with the wage increase. The month of May was selected as the time to implement the increase as that month is an active recruiting period for new nurses.

LaPosta testified that her answers to questions about the proposed raise, as well as questions about other benefits were couched in terms of what would happen if the Union were certified and what would happen if it lost the election. She testified that she told employees that if the Union were certified at that point in time, there was the possibility that issues around wages, conditions of work, and compensation must be the subject to the process of collective bargaining. She told employees that if the Union were not certified, then the Respondent would implement the raise in May.

At a meeting she attended with the intensive care unit nurses on January 17, she was asked whether she was going to give the raise as proposed. According to LaPosta, she said, "Am I, Mary Jo LaPosta, going to give you a raise?" "No, this raise is part of the overall compensation plan for Albany Medical Center for 2003." She told the nurses that it was Respondent's intention to move forward with the compensation plan. She denied saying the Respondent would take away or deny employees the raise if the Union got in. LaPosta testified that she "talked about the concept of collective bargaining and did speak about the fact that in the process of collective bargaining I did quote out of this particular book (the NLRB guide to basic law and procedures), that certain things were subject to the collective-bargaining process and compensation was one of those things that, as people moved to the table in the process of collective bargaining, the compensation is part of that." She further told the nurses, "I encourage the people to review information. And I did speak about what collective bargaining was and what the process was. And (I) said it is bargaining and bargaining means that in the process of bargaining certain things were brought to the table. Some things may be increased, some things may decrease. You may get some things, you may lose some things."

In response to questions about whether she said during this meeting that "bargaining would be from the ground up," or that "bargaining would be from scratch," LaPosta answered, "I don't believe I used that terminology." In response to a question from me about whether she had in this meeting used the phrase "wipe the slate clean" or "the slate would be wiped clean," she answered "I don't recall using either one of those phrases." LaPosta denied ever stating in the meeting that Respondent would take away the weekend track program and (the existing) vacation benefit if the union were elected.

In response to a question about her understanding of what would happen if the Union were certified, she answered, "The

two dollar raise, like dental insurance or our retirement, was a benefit that was in place at this point in time. And it was an existing thing that was going to happen to our employees. And that it was our plan to move forward." She later added, "My understanding was as we moved forward in the process of collective bargaining the union could choose to bring to the table a number of difference issues around wages, compensation, and benefits. We also, as the Employer, could do that as well, and then those elements of our benefits package, be it vacation, be it whatever, could be subject to the process of negotiation." According to LaPosta, she also told the nurses that the \$2 raise could be subject to negotiation. Vacations and weekend track were also mentioned.

After Busch spoke out at the meeting, LaPosta told the nurses, "... certain things were brought to the table and other things were brought to the table and it is a process of negotiation. So, we don't always get extra things during the process of negotiation. But employees may lose things as well, or trade off things for other things."

Nurse Manager Karen Sigond attended the meeting. She testified that there was a rumor that the wage increase was going away. One of the nurses inquired about it and according to Sigond, LaPosta said "there was no plan to take it away as it was part of the strategic strategy. But then she spoke about the collective bargaining. So that if the union were voted in, at the collective bargaining table those kinds of things would be up for negotiation." "She didn't say it (the raise) would be taken away. She said it would be something that would have to be discussed at the bargaining table." According to Sigond, LaPosta said that "the raise was likely to be back to the table to be negotiated." Sigond testified that LaPosta said that vacation and weekend track were examples of the same types of things as the \$2 an hour raise (things that would have to be looked at at the bargaining table).

I credit Busch's account of what LaPosta said at the meeting. She gave detailed testimony about the meeting and LaPosta would not flatly deny saying what Busch alleged she said. On the other hand, I do not think the case would turn out differently whether I credited LaPosta's version or that of Sigond. Employer statements that preexisting terms and conditions of employment are subject to the collective-bargaining process do not violate the Act. *Mantrose-Haeuser Co.*, 306 NLRB 377 (1992) (employer statements that employees "take the risks" with wages and benefits when a union is elected did not constitute an unlawful threat in violation of Section 8(a)(1) of the Act); *Flexsteel Industries*, 311 NLRB 257 (1993) (employer statements "present benefits could be lost" and the "company could not unilaterally give a wage increase" do not violate the Act because the statements merely describe "what lawfully could happen during the give and take of bargaining with the union"); *Bi-Lo*, 303 NLRB 749, 749-750 (1991) (employer's statements that: "(1) the contract negotiation process was like horse trading; (2) employees could gain new benefits or lose existing benefits; and (3) in bargaining for a first contract, there is greater degree of uncertainty because the parties have no track record of past negotiations and contracts on which to rely in forecasting what particular benefits may be gained or lost in the negotiations" did not violate Section 8(a)(1) of the Act);

Venture Industries, Inc., 330 NLRB 1133, 1140 (2000) (employer's statements that benefits could be "put at risk" and that "if the employees select the [u]nion as their collective bargaining representative, wages, overtime, and benefits become negotiable" were not implicit threats to decrease benefits).

Employer's "bargaining from scratch" statements do not violate Section 8(a)(1) of the Act when other communications make it clear that any reduction in wages and benefits will occur only as a result of the normal give and take of negotiations. *Somerset Welding & Steel, Inc.*, 314 NLRB 829, 832 (1994). I believe LaPosta's comments regarding existing benefits other than the promised pay increase fall within the allowable parameters of the Board's holdings in the cited cases. However, I believe that her comments regarding the wage increase violated Section 8(a)(1) of the Act. See *Advo System, Inc.*, 297 NLRB 926 fn. 3 (1990), wherein the Board found that an employer had threatened to withhold a scheduled wage increase in violation of Section 8(a)(1) where, in response to an employee asking about the increase, the employer's director of branch operations stated that if the union was elected "everything would be negotiable." See also *Earthgrains Co.*, 336 NLRB 1119, 1220 (2001). In the meeting with LaPosta, both Busch and Sigond came away with the clear understanding that the wage increase would not be implemented if the Union were certified and that it would then be subject to bargaining. Based on Board's holding in *Advo Systems*, supra, I find LaPosta's statements concerning the wage increase to be in violation of Section 8(a)(1) of the Act.

D. Issues Related to Sigond's Alleged Threat

In late January or early February, Busch had a casual conversation with Sigond. According to Busch, in the course of this conversation, Sigond commented that if the Union were to get in that many of the supervisory positions and managerial positions would be in jeopardy and they could lose their jobs. According to Busch, Sigond also told her that the Union would interfere with relationships on the unit, which were good. Sigond added that management and staff would not be able to communicate as freely they had. Sigond commented that she felt the Respondent had done Busch a favor by rehiring her and was surprised that Busch was involved in the union campaign.

Sigond was asked "Did you ever have a conversation with Ms. Busch where you told her or asked her why she wanted to go and do this and cause problems related to the Union campaign?" Sigond answered, "I don't remember ever asking her that question. I remember the day that she's talking about. I had actually forgotten about it. I never really approached Debbie [Busch] about any of this union activity." When prompted by some more questions, Sigond testified, "Because I really do not remember the whole conversation, but I know that I did not say I'm sorry they brought you back. I did not say that." She denied telling Busch that she had done her a favor in bringing her back. Sigond remembered telling Busch that she did not understand why we're going through this again. She denied saying that if the Union got in, that she and other nurse managers would lose their jobs. She testified that she told Busch that if the Union got in the relationship between the staff and herself would be different in the union environment. By this she meant

she would not be able to advocate for the staff as she did in the nonunion environment which presently existed.

I do not find that Sigond's comments violate the Act. Accepting Busch's version of the conversation, Sigond only voiced the opinion that management employees might lose their jobs if the Union were selected. Expressing disappointment or surprise because of Busch's support for the Union without an explicit or implied threat of reprisal for that support does not violate Section 8(a)(1) of the Act. There was no such threat directed at Busch or any other member of the proposed bargaining unit. Sigond's comments that management's ability to freely communicate with staff would suffer with the Union in place and that the Union would interfere with relationships do not violate the Act. *Star Fibers*, 299 NLRB 789, 790 (1990); *United Builders Supply Co.*, 287 NLRB 1364, 1372 (1988).

CONCLUSIONS OF LAW

1. Respondent Albany Medical Center is an employer within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling employees that pay increases scheduled for implementation in May would be subject to collective bargaining if the Union were to be selected as the employees' bargaining representative, Respondent unlawfully coerced employees with regard to their membership in, sympathy for, and support of the Union prior to the election in violation of Section 8(a)(1) of the Act.

4. The Respondent did not violate the Act in any other manner alleged in the complaint.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. It is recommended that Respondent be ordered to post an appropriate notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Albany Medical Center, Albany, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that pay increases scheduled for implementation in May would be subject to collective bargaining if the Union were to be selected as the employees' bargaining representative;

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act

(a) Within 14 days after service by the Region, post at its facility in Albany, New York, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region Three, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 17, 2003.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 10, 2003

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More specifically,

WE WILL NOT threaten that an announced \$2-an-hour pay increase will be cancelled or changed in any way if you select a union as your collective-bargaining representative.

ALBANY MEDICAL CENTER